United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

74-1383

To Be Argued By
Ivan Michael Schaeffer

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P/S

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SALVATORE ALBANESE,

PETITIONER-APPELLANT

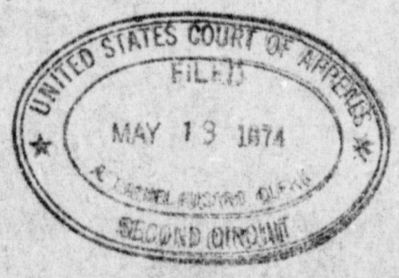
v.

UNITED STATES OF AMERICA,

APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES



HENRY E. PETERSEN,
Assistant Attorney General

EDWARD J. BOYD,
United States Attorney,
Brooklyn, New York

SHIRLEY BACCUS-LOBEL,
IVAN MICHAEL SCHAEFFER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

I N D E X

C I T A T I O N S

Cases:

Cases--continued

Cases - continued

Statutes:

Miscellaneous:

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BRIEF FOR THE UNITED STATES

QUESTION PRESENTED

Whether appellant is entitled to credit for a period of pre-trial incarceration toward a sentence of probation.

STATUTES INVOLVED

18 U.S.C. §3568, in pertinent part provides:

> The sentence of imprisonment of any person convicted of an offense shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of such sentence. The Attorney General shall give any such person credit toward service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed.
>
> * * *
>
> No sentence shall prescribe any other method of computing the term.

18 U.S.C. §3651, provides, in pertinent part:

> Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.
>
> * * *
>
> The court may revoke or modify any condition of probation, or may change the period of probation.
>
> The period of probation, together with any extension thereof, shall not exceed five years.
>
> * * *

18 U.S.C. §3653, in pertinent part, provides:

> When directed by the court, the probation officer shall report to the court, with a statement of the conduct of the probationer while on probation. The court may thereupon discharge the probationer from further supervision and may terminate the proceedings against him, or may extend the probation, as shall seem advisable.

STATEMENT OF THE CASE

Appellant Salvatore Albanese was convicted, along with three others, for the robbery of merchandise moving in interstate commerce, in violation of 18 U.S.C. §1951, and for conspiracy to commit the robbery. On June 9, 1969 appellant received a ten year suspended sentence on each count of the indictment, the sentences to run concurrently. He was then placed on probation for five years. Appellant, and each of the other defendants, appealed his conviction to this Court which affirmed the decision of the district court. United States v. Persico, 425 F.2d 1375 (2nd Cir., 1970), cert. denied, 400 U.S. 869 (1970).

Appellant was first arrested for the offense leading to his ultimate conviction on March 7, 1960. Due to his inability to make bail he remained incarcerated until May 20, 1963 on which date he was released following this Court's reversal of his conviction at his second trial.[1/] United States v. Persico, 305 F.2d 534 (2nd Cir., 1962). By the time of his release appellant had been incarcerated for over three years and two months.[2/]

1/ Albanese was tried five times. The first trial in May, 1961 ended in a hung jury. The second trial ended in a conviction which was reversed by this Court. United States v. Persico, 305 F.2d 534 (2nd Cir., 1962). The third trial, held in the spring of 1963, resulted in a mistrial following the shooting of one of the defendants. The fourth trial in early 1964 ended in conviction of all defendants. This conviction was again reversed by this Court based on errors in the district court's charge to the jury. United States v. Persico, 349 F.2d 6 (2nd Cir., 1965). The fifth trial, occurred in April and May, 1968, and resulted in the conviction of all defendants. This conviction was affirmed in United States v. Persico, 425 F.2d 1375 (2nd Cir., 1970), cert. denied, 400 U.S. 869 (1970). Id., 425 F.2d at 1377.

2/ The precise period of incarceration was 1170 days.

The instant proceeding commenced on December 4, 1973 with the filing of appellant's notice of Motion for Credit Toward the Sentence Imposed of Pretrial Confinement Time. The motion, filed pursuant to 28 U.S.C. §2255, was argued on the same day before Judge Dooling in the United States District Court for the Eastern District of New York. Judge Dooling, following a full hearing, denied appellant's motion. Appellant, thereafter, filed a timely notice of appeal.

Appellant urged, at the time of hearing, that he be given credit for the period during which he was incarcerated between March 7, 1960, and May 20, 1963, toward the period of probation which the district court (Dooling, J.) had prescribed following appellant's conviction. This would provide appellant with over 38 months credit toward his discharge from probation. Appellant had been on probation from January 18, 1972 through December 4, 1973, the date of his motion. Therefore, appellant had served 22 1/2 months of his five year term of probation. Credit for the earlier incarceration would have served to complete appellant's probation term.

ARGUMENT

APPELLANT IS NOT ENTITLED TO CREDIT FOR PRE-TRIAL INCARCERATION TOWARD A SENTENCE OF PROBATION

A. 18 U.S.C.§3568 Does Not Require That Credit For Pre-Trial Incarceration Be Given Toward A Sentence Of Probation.

Appellant's principal contention is that he is entitled to credit for a period of pre-trial incarceration toward a term of probation. He seeks to support his argument by the statutory language contained in 18 U.S.C. §3568. Examination of that statute proves it to be wholly inapplicable to the judicial sentencing function and, indeed, to the probation situation generally. The first two sentences of §3568 read:

> The sentence of imprisonment of any person convicted of an offense shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of such sentence. The Attorney General shall give any such person credit toward service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed. [Emphasis added]

Thus the express and unambiguous language of the statute shows clearly that it is addressed to the executive, not the judicial branch of government and that it applies solely to sentences of incarceration. This section provides that credit be given for pre-trial incarceration against a sentence of imprisonment. The section states that sentence "shall commence to run from the date on which such person is received at the penitentiary, refor-

matory, or jail". These are the only instances in which Congress desired to grant credit for pre-trial incarceration. Consistent with its design, the section, dealing with an executive function, is silent as to probation, a province of the judiciary, and based on the legislative history of this provision there is no reason to believe that Congress intended, sub silentio, to grant credit toward probation.[3/] See 2 U.S. Cong.& Adm. News '60 3288; 2 U.S. Cong. & Adm. News '66 2293, 2306.

This section directs that credit for pre-trial incarceration toward service of sentence shall be granted by the Attorney General. Thus, it is not a general statute automatically conveying credit in all instances but only in those cases in which a person is placed in the custody of the Attorney General. The case of a probationer, however, is not one in which custody is placed in the Attorney General.[4/] Those admitted to probation remain under the supervision of the probation officer who is an officer of the court and not a representative of the Attorney General. While on probation the probationer remains within the

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3/ Under the statutory construction doctrine of ejusdem generis it is possible that credit could be granted in detention situations, such as where a person is sentenced to a work farm. While the phrase "penitentiary, reformatory, or jail" may not have been designed to be all inclusive, it clearly only is designed to apply to true incarceration detention.

4/ Of course, if probation is revoked and the sentencing judge directs that the previously suspended sentence become operative, the individual is committed to the custody of the Attorney General and the requirements of §3568 become applicable.

jurisdiction of the court. See, e.g., United States v. Gerson, 192 F.Supp. 864, 865 (D. Tenn., 1961), aff'd., 302 F.2d 430 (6th Cir., 1962). Probation officers, in turn, are supervised by and report to the Director of the Administrative Office of the United States Courts, an officia' of the judiciary. 18 U.S.C. §§3655-3656. On this basis alone it is clear that 18 U.S.C. §3568 is inapplicable to a sentencing judge and is not a provision under which he could provide appellant with the relief which he is seeking.

Although the express language of the statute clearly shows that §3658 has no application to term of probation, it is perhaps worth noting that an examination of the legislative history of the statute reveals no contrary manifestation of congressional intent.

The legislative history of the 1960 and 1966 amendments to this section illustrate that Congress did not intend to grant probationers credit for pre-trial incarceration. Prior to the 1960 amendment, 18 U.S.C. §3568 did not provide for credit for confinement prior to sentence. The purpose of the 1960 amendment was "to provide credit toward service of sentence for time spent in custody for want of bail prior to the imposition of sentence by the sentencing court where the statute involved requires the imposition of a minimum mandatory sentence." H.R.Rep.No. 2058, 86th Cong., 2nd Sess. 2 (1960), 2 U.S. Cong. & Adm. News '60 3288. This amendment was adopted solely to assure that those convicted of offenses carrying mandatory minimum sentences would not be required to serve more than the mandatory minimum due to the

inability to make bail. Prior to the enactment of this provision credit for pre-trial time served could not be granted to those imprisoned because of their inability to make bail. Id., 2 Cong. & Adm. News '60, supra, at 3289. It was only in this limited instance that credit would be granted. The amendment is devoid of any suggestion that such credit be extended beyond the narrow scope intended to include probation.

The statute was again amended in 1966 by the Bail Reform Act, P.L. 89-465, §4, 80 Stat. 217. The purpose of this amendment "is to provide credit for time spent in custody. Such a person shall receive credit toward service of a sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed." H.R.Rep.No. 1541, 89th Cong., 2nd Sess. (1966), 2 U.S. Cong. & Adm. News '66 2293, 2306. Again, the provision and its legislative history are silent as to credit toward terms of probation. Had Congress intended to include probation in the class of instances where credit was to be given it certainly would have manifested that intent.

Absent a specific showing of legislative intent, credit could only be granted if appellant could demonstrate that probation and incarceration are in fact the same thing. This is a showing which appellant cannot make. The courts have long recognized the distinction between incarceration and probation. As this Court stated as early as 1928 in Kaplan v. Hecht, 24 F.2d 664 (2nd Cir., 1928):

> [P]robation is not intended to be the equilavant of imprisonment. The aim of the statute is reformatory

> not punitive, and its language carries the aim into effect. [24 F.2d at 665].

Relying on this Court's decision in Kaplan v. Hecht, supra, in United States v. Guzzi, 177 F.Supp. 785, 786 (E.D. Pa., 1959) aff'd., 275 F.2d 725 (3rd Cir., 1960), the court rejected the contention that probation supervision and incarceration are identical. The courts have gone so far as to hold that the suspension of "execution of sentence is distinct and separable from the sentence itself . . ." 36 Op. Att'y Gen. 186, 190 (1930). Quoting from the court's decision in United States v. Gargano, 25 F.2d 723, 724 (E.D. La., 1928), the Attorney General's Opinion continues:

> The sentence is imposed according to the penal statute under which the conviction is had, and is a judicial function flowing directly from the statute under which the criminal proceeding is brought; whereas the duties imposed by the Probation Act are of rather an auxiliary or ancillary character, sui generis in nature. These constitute a judicial function only by virtue of the legislative authority which Congress vested separately in the court, and which might well have been vested in some executive officer, board, bureau, or commission. [36 Op. Att'y Gen., supra, at 190].

The distinction between probation and incarceration is thus clear.

While the courts have apparently not addressed the contentions raised by appellant they have often considered the converse question of whether credit should be given for probation when a party is later sentenced to incarceration. These decisions fortify the distinction between probation and incarceration.

Kaplan v. Hecht, supra; Barber v. United States, 368 F.2d 463 (5th Cir., 1968); Thomas v. United States, 327 F.2d 795 (10th Cir., 1964) (following revocation of probation a judge can require a defendant to serve any part, or all, of original sentence); United States v. Guzzi, 275 F.2d 725 (2nd Cir., 1960) ("[T]he federal rule is clear that [time on probation] is not credited to the defendant on his sentence." Id.); Allen v. United States, 209 F.2d 353 (6th Cir., 1953).

In sum, it is abundantly clear that 18 U.S.C. §3568 affords appellant no basis for relief.

B. The District Court Was Not Obligated To Credit Appellant's Period Of Pre-Trial Incarceration Against The Term Of Probation Imposed.

Sentencing discretion is vested in the district court which is bound in exercising that discretion only by limitations imposed by statutes and the constitution. As we have demonstrated, no statute dictates the result urged by appellant. Moreover, appellant does not argue that, as a constitutional matter, he is entitled to credit for time served prior to sentence toward the term of probation received. Whatever the considerations may be with respect to credit for time served toward a sentence of imprisonment (see e.g., Wright v. Maryland, 429 F.2d 1101, 1103-1104 (4th Cir., 1970)),[5/] they have no application here, given the very

5/ At least one court of appeals has rejected the notion that there is a federal constitutional right to credit for pre-trial incarceration towards a term of imprisonment. Gremillion v. Henderson, 425 F.2d 1293, 1294 (5th Cir., 1970).

fundamental distinction between incarceration and probation. To employ a tired metaphor, appellant's suggestion that he is somehow entitled to have his term of probation reduced because he was incarcerated for a period prior to trial confuses apples with oranges. Neither principles of fairness nor policy considerations warrant the severe intrusion upon the sentencing court's discretion which the conclusion urged by appellant would entail.

The scope of the sentencing judge's discretion has been recognized on many occasions by this Court. In the recent case of United States v. Sweig, 454 F.2d 183-84 (2nd Cir., 1972) this Court stated:

> A sentencing judge has very broad discretion in imposing any sentence within the statutory limits, and in exercising that discretion he may and should consider matters that would not be admissable at a trial.

Similarly, in United States v. Tucker, 404 U.S. 443, 446 (1972), the Supreme Court observed that "[i]t is surely true . . . that a trial judge in the federal judicial system generally has wide discretion in determining what sentence to impose." See also, United States v. Vermeulen, 436 F.2d 72 (2nd Cir., 1970), cert. denied, 402 U.S. 911 (1971). Similarly the courts have uniformly held that sentences imposed by federal district judges, if within the statutory limits, are not, absent a plain showing of gross abuse, subject to appellate review. United States v. Tucker, supra, 404 U.S. at 447; Gore v. United States, 357 U.S. 386, 393 (1958); cf. Yates v. United States, 356 U.S. 363 (1958); Williams v. New York, 337 U.S. 241 (1949); United States v. Dzialak, 463

F.2d 221 (2nd Cir., 1972), cert. denied, 409 U.S. 452 (1973) (court of appeals is without authority to review severity of sentence).

The district court's sentencing discretion also extends to the area of probation. 18 U.S.C. §3651. This circuit has regognized the broad discretion of the trial judge in both granting and revoking probation. United States v. Wilson, 469 F.2d 368 (2nd Cir., 1972); United States v. Markovich, 348 F.2d 238 (2nd Cir., 1965); United States v. Squillante, 235 F.2d 46 (2nd Cir., 1956).

An examination of the sentence imposed in the instant case demonstrates that it is within the sound sentencing discretion of the trial judge. Appellant was sentenced to concurrent terms of imprisonment of ten years on each of the two counts of the indictment. The district court suspended execution of the sentence and placed appellant on probation for the maximum permissable term of five years. There can be no claim that this sentence exceeded the discretionary authority vested in the sentencing judge.

Appellant was convicted for violating 18 U.S.C. §1951. That statute provides for a maximum fine of not more than $10,000, or a maximum term of incarceration of not more than twenty years, or for both fine and imprisonment. The term imposed by the district court does not exceed the permissible statutory term. Similarly, in placing appellant on probation for five years, the district court did not exceed the maximum period of probation provided for in 18 U.S.C. §3651.

Appellant nevertheless urges upon this Court a novel proposition which would significantly intrude upon the district court's exercise of discretion in sentencing matters. As shown such an intrusion is contrary to well established and long-standing principles. Appellant points to no considerations warranting a departure from these principles. Indeed, the nature of probation is such that the unimpeded exercise of discretion by the sentencing judge is particularly appropriate.

Probation provides the sentencing judge with an alternative means of seeing justice done without the necessity of resorting to incarceration. Probation allows the court another option through which it can seek to help the individual offender. 36 Op. Att'y Gen. 186 (1930).[6/]

The Supreme Court explained the purpose of the Probation Act in United States v. Murray, 275 U.S. 347, 357-58 (1928), as follows:

> [The Act provides] an amelioration of the sentence by delaying actual execution or providing a suspension so that the stigma might be withheld and an opportunity for reform and repentence be granted before actual imprisonment should stain the life of the convict. * * *
>
> The great desideratum was the giving to young and new violators of law a chance to reform and to escape the contaminating influence of association with hardened or veteran criminals in the beginning of the imprisonment. * * * Probation is the

6/ Prior to the enactment of the Probation Act the Courts were without power to suspend sentence and impose probation. Ex parte United States, 242 U.S. 27 (1916).

> attempted saving of a man who has taken one wrong step and whom the judge thinks to be a brand who can be plucked from the burning at the time of the imposition of sentence.
> * * *

See also Kaplan v. Hecht, supra.

The institution of probation had long been considered "a matter of grace", Escoe v. Zerbst, 295 U.S. 490, 492 (1935); United States v. Birnbaum, 421 F.2d 993, 998 (2nd Cir., 1970), cert. denied, 397 U.S. 1044 (1970), and the probationer had not always been afforded full due process or equal protection of law in the areas of extension or revocation of probation. This view, however, has now been abandoned. Gagnon v. Scarpelli, 411 U.S. 778 (1973); see also Morrisey v. Brewer, 408 U.S. 471 (1972).

The purposes and objectives of probation have recently been described as follows:

> The primary objective of probation is the protection of society through the rehabilitation of the offender. Probation is not an act of leniency. Its purpose is to "provide an individualized program for a young or unhardened offender an opportunity to rehabilitate himself without institutional confinement under the tutelage of a probation official and under the continuing [jurisdiction] of the court to impose institutional punishment for his original offense in the event that he abuse the opportunity" . . . The judgment of the sentencing court is at best a calculated risk based on the court's belief that the offender is suitable for rehabilitation through return to the community under probation supervision. Such a belief is founded on many factors, some tangible, some rather intangible. And when it develops that the Judge's confidence has been misplaced, prompt steps may be taken to protect both the public, and

> the probationer. [United States v. Allen, 349 F.Supp. 749, 753 (N.D. Calif., 1972); citation omitted, brackets in the original.]

Probation, therefore, is tailored to meet specific rehabilitative needs of each given offender. The sentencing judge, in his discretion, must determine, within statutory limits, the period of probation which will best serve the rehabilitative needs of the probationer. To tamper with the period of probation by crediting appellant's pretrial incarceration time toward his probation would be an ill-conceived intrusion upon the sentencing court's discretion--an intrusion that is neither constitutionally or statutorily compelled nor otherwise warranted.[7/]

Finally, we note that, despite the lack of necessity to do so, the sentencing judge did reveal the reasons for the sentence he imposed at the time of the hearing on appellant's Motion. Judge Dooling stated:

> Now, certainly it was my intention, if lawful, that he should be under probationary supervision for the whole of the five-year period. The thought of the sentence was that he would after the date of the commission of the offense serve a healthy amount of time in prison, more than a third of any

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7/ The judge here sentenced appellant to the maximum probationary term, five years, permitted by the statute, 18 U.S.C. §3651. Since appellant could have been sentenced to a lesser period of probation, imposition of the maximum term reflects the court's considered judgment that this was necessary to the achievement of the rehabilitative goal reflected in sentence. Had the court been bound to credit the period of pretrial incarceration against the five-year term of probation, it is questionable whether the appreciably lesser period of probation would have been satisfactory to the court. It is reasonable to assume that the rule urged by appellant would have an inhibitory affect where probation is considered by a court.

sentence--well, no, but creeping up on the third of almost any sentence which you could think of was appropriate for him. He had a record as a second offender and I at least thought that he stood in need of supervision, having in mind particularly that this would help Mr. Albanese get out of the ugly little circle of perhaps which he had been in since 1959, and be out of it altogether. So that is what I had in mind. [Appellant's App. 17a-18a]

* * * *

Now, in imposing the 10-year sentence, to 10 years, was of course, to a certain extent, and as a rule, well, sentence was intended to simplify Mr. Albanese's problem by giving him an enormous incentive to avoid violations of probation. It, I think, is fair to say, had a little extra in it, but very little extra, I wanted it to be a rounded amount but something where if anybody ever said to him, "Come on, you can go along with this, this is pretty safe", he would say, "Look, I have got 10 years hanging over my head; forget it." And that is much easier to say than if it were 9 years or 8 years or 7--or 11--"I have 10 years hanging over my head," et cetera. That was intended to be his rule of life for the next five years, and by that time I figured at least his age, he had a wife and I think one or two children, he ought to be in the clear and ready to get to work.

* * * *

Now, the reason sentence was suspended and he did not receive any term of imprisonment . . . was that he had spent so much time in prison already on this and other counts that everything the prison could do for him had at least in theory been done . . .

> For that reason, it seemed to me that the idea of throwing him back to jail for this ancient offense was not indicated . . . [Appellant's App. 23a-24a.]

These reasons, while not required of the sentencing judge, provide clear indicia of the thought which went into the sentencing decision[8/] and provide as well an illustration of the sound rationale which underlies the principle granting to district courts a very wide discretion in sentencing matters.

CONCLUSION

The district court's denial of the Motion should be affirmed.

Respectfully submitted,

HENRY E. PETERSEN,
Assistant Attorney General
Criminal Division

EDWARD J. BOYD
United States Attorney

SHIRLEY BACCUS-LOBEL,
IVAN MICHAEL SCHAEFFER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

8/ Appellant appears to submit that it was improper for the court to state, at the hearing below, the rationale underlying the sentence imposed. He argues that a statement of reasons is appropriate only at the initial sentencing hearing and that this reasoning may not be offered or clarified in a subsequent proceeding. We fail to perceive how an objection to this procedure relates to appellant's principal contention--that he was entitled to credit for time served prior to trial toward the maximum five-year term of probation imposed. In any event, this Court has expressly approved such a procedure. McGee v. United States, 462 F.2d 243, 247 (2nd Cir., 1972).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Brief for the United States were served upon H. Elliot Wales, counsel for the appellant at 747 Third Avenue, New York, New York 10007 by first-class mail, postage prepaid, this 1st day of May, 1974.

IVAN MICHAEL SCHAEFFER, Attorney

GPO 862-508 PO CM5